

BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

IN THE MATTER OF:

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NO.: 99-05

DUE PROCESS HEARING

FINAL ORDER

Jack E. Seaman
Administrative Law Judge
611 Commerce Street, Suite 2704
Nashville, Tennessee 37203
615/255-0033
Prof. Resp. No. 4058
July 23, 1999

FINAL ORDER

Case No. 99-05

A Due Process Hearing was conducted in this matter over a period of 3 days. Both parties were represented by counsel and a waiver of the requirement for hearing and decision within 45 days had been previously granted.

BACKGROUND

This case involves a 12-year-old female seventh grader. She was certified as eligible for special education as health impaired (HI or Other Health Impaired - OHI) in December of 1993 based upon a diagnosis of ADHD (Attention Deficit Hyperactivity Disorder). The special education services involved "consultation" with zero hours in special education and included a special discipline plan. She was decertified in January of 1997 after the 3-year reevaluation. She has always been aggressive and behavior related to her aggressive nature has resulted in numerous disciplinary actions throughout her school career.

In November of 1998 the student allegedly smacked or slapped a teacher who was directing students in a school hallway. The school scheduled a disciplinary hearing related to the November incident but it was not held because the parent obtained counsel, requested evaluation, and subsequently requested a Due Process Hearing. In November an S-Team was convened to consider the student and formal referral for evaluation for special education

was made. The evaluation process resulted in an integrated assessment report with all participants reporting that they did not believe the student qualified for certification as eligible for special education. On January 11, 1999, an M-Team met and concluded that the student was not eligible for certification for special education and related services. Although it is reported that all members of the M-Team were in agreement, the mother testified that she did not agree. Testimony is conflicting about the mother's position and statements at the M-Team meeting.

DISCUSSION

At the beginning of the hearing the student's mother was asked by her counsel why she was at the hearing and the mother testified that she was "basically here to try to obtain some help for my daughter . . ." because "she was diagnosed with ADHD. She's always had behavior problems that, you know, kind of kept her from really being successful in school . . ." The proof on behalf of the student consisted of the mother, a psychologist, and various school personnel who were later recalled by the school system.

The student presented a psychologist who had first met with the parent on February 8, 1999 when the parent requested further evaluation of the student. The psychologist had performed a series of tests, conducted interviews, and reviewed records and school evaluations. He agreed with the previous diagnosis of ADHD, did not disagree with the previous diagnosis of ODD (Oppositional

Defiant Disorder) and, at the time of testifying, had a new diagnosis of PTSD (Post-Traumatic Stress Disorder). The psychologist testified that his evaluation showed evidence of anxiety and depression and, in his opinion, the child had a disability and needed special education and related services based upon ADHD as the primary disability.

The school system presented a university research professor of special education psychology with extensive experience involving ADHD and ODD who had reviewed all school records, other professional records, tests and evaluations, and depositions which were included in notebook exhibits at the hearing. After review, he formed an opinion that this student did not satisfy the criteria for OHI (Other Health Impaired) under IDEA and, in fact, that she did not satisfy the criteria for eligibility under any IDEA category. This witness was of the opinion that being identified as a special ed student would not necessarily be beneficial for the student and was concerned about the risk for increasing levels of severity in behavior episodes if the student did not "get a grip on her behaviors now".

A private practicing clinical psychologist presented by the school system had conducted an evaluation as part of the assessment team and participated in the M-Team. His determination was that this student was not eligible for certification as SED (Seriously Emotionally Disturbed) and, although he thought she probably suffered ADHD, a mild or borderline case, he did not believe the

ADHD was responsible for her behavior problems. This witness had reviewed the various testing instruments used by the student's psychologist, and others, and found that there was no evidence of depression, anxiety, or any other serious psychological condition.

The school system also called a board certified adolescent psychiatrist who had been a member of the assessment team and M-Team. He later conducted further investigation and reviewed depositions in preparation to testify at the hearing. He was of the opinion that this student did not have an educational disability under IDEA and did not meet the criteria for OHI.

Various other witnesses were presented by the school system, some of whom had previously been called on behalf of the student, and all supported the determination of ineligibility by the M-Team.

It is agreed this student has behavior problems; however, there appears to be some question as to whether those behavior problems cause her to be eligible, under the law, to receive special education and related services.

The Individuals with Disabilities Education Act has the stated purpose "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs" 20 U.S.C. §1400(d)(1)(A). The federal regulation provides that a "child with a disability" includes "an

other health impairment". 34 C.F.R. §300.7(a)(1). Other health impairment is further defined as follows:

"(9) Other health impairment means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that -

"(i) is due to chronic or acute health problems such as . . . Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder . . . ; and

"(ii) adversely affects a child's educational performance."

Tennessee uses the criteria defined as "health impaired" which means "a child who has limited strength, vitality or alertness due to chronic or acute health problems, such as Attention Deficit Disorder...which adversely affect educational performance..."

Behavioral problems can result in a handicapping condition requiring special education under the Act. See Honig v. Doe, 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). In Honig, the Court noted that the student was unable to control his impulsive, aggressive behavior and that his "very inability to conform his conduct to socially acceptable norms [rendered] him 'handicapped' within the meaning of the Act." Id. at 320, 108 S.Ct. at 602, 98 L.Ed.2d at 705. See 20 U.S.C. 1401(1), 34 C.F.R. 300.5(b)(8) (1987). See also Clevenger v. Oak Ridge School Bd., supra, at 516. The instant case differs from these authorities. The evidence produced in this Due Process proceeding simply does not establish a certifiable handicapping condition under IDEA law.

Tennessee Regulations define "regular school program" to include "the variety of programs used by regular classroom teachers to respond directly to the various learning styles and learner objectives of students but does not include specialty designed instruction to meet the unique needs of an individual child required because the child is unable to benefit from the instructional experiences designed by the regular classroom teacher." Tennessee Regulations 0520-1-3-.09-ee.

The testimony of various teachers at different grade levels testified that this student did well when they provided positive reinforcement by granting recognition when the student behaved as she should in class instead of providing negative reinforcement by only recognizing her misbehavior. The board certified adolescent psychiatrist testified that he believed a student should receive consequences for misbehavior and bad choices but that, in his opinion, this student should not be expelled from school. He had presented his position at the M-Team meeting and his testimony was as follows:

"I think someone like N. needs a creative behavior intervention plan and that plan should include some clearly identified expectations and some clearly identified incentives. Children need positive interventions in addition to the consequences to help deal with behavior. Clearly in the past when people intervene in a positive manner with her, she responds well, and that that may also include the possibility of giving her some responsibilities, some positive experiences and if that kind of plan which would include some involvement with home and school working together, that it's a seamless, if you will, interconnected

intervention plan, I think that that is what is required to help her." (Page 856).

As indicated by the testimony of the various teachers and other witnesses, this is regular education by "good" teachers. The testimony offered indicated that classroom misbehavior was generally restricted to classrooms of inexperienced teachers and other misbehavior occurred outside the classroom.

The determination of the validity of the M-Team determination on January 11, 1999 must be based upon the evidence of record and the applicable law. The exhibits and testimony presented clearly establish that appropriate evaluation was performed and that everyone, except possibly the mother, was of the opinion on January 11, 1999 that the student was not eligible under IDEA for special education services. A psychologist hired by counsel for the student and who first met with the parent in February of 1999 was of the opinion, and he so testified at the Due Process Hearing, that the student should have been certified as eligible for special education. However, cross-examination of this witness and the testimony of various expert witnesses called on behalf of the School System discredited his conclusions. These other witnesses had reviewed the same information, including the evaluation instruments used by this psychologist, and disagreed with his conclusions. The testimony and opinions of these witnesses was based upon more information regarding this student, and discredited the conclusions of the student's psychologist witness to the extent

that a holding in favor of eligibility for certification will not be based upon his opinion alone.

The psychologist witness presented on behalf of the student had made his PTSD diagnosis subsequent to being deposed 5 days before the Due Process Hearing. After learning of this new diagnosis, at the hearing the School System offered to conduct an evaluation as to PTSD and transfer the student to another school (as had been and was being requested by the student) and develop a behavior management type program, all pending a determination of eligibility. The School System suggested that the management program might well resolve behavior issues and that there would be no need for an eligibility determination. The offer was rejected, at least in part because transportation was not included in the offer.

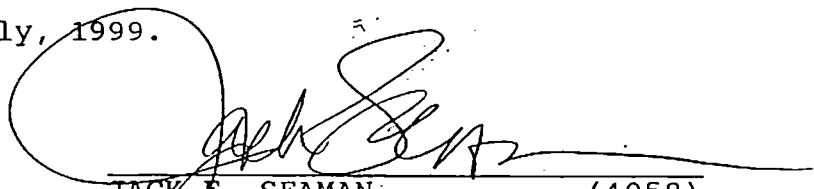
The testimony of all the witnesses, including the expert witnesses, teachers, and administrators presented by the school and/or the student's attorney, established, to the satisfaction of the Administrative Law Judge, that the School System acted appropriately in not identifying this student as eligible for special education and related services under IDEA. The evidence establishes that the student does not have "limited strength, vitality or alertness" due to ADHD which adversely affects her educational performance.

This record clearly supports the determination of the M-Team on January 11, 1999 in determining, based upon all the information known and available to them, that this student was not eligible under IDEA for educational services as health impaired. However, it appears clear from this record that for this student to have a successful educational experience the school personnel must provide nurturing. If the school seeks to catch this student engaging in misbehavior and punishes her, this student's behavior will only worsen. The school system presented evidence that it can and will serve this student in regular education. As of January 11, 1999 the evidence established ineligibility for special education. This does not foreclose future determination otherwise based upon circumstances that may be established since that date.

DECISION

It is hereby ORDERED that the student is not eligible for special education and related services under the basis of health impairment or other health impaired.

This 23rd day of July, 1999.



JACK E. SEAMAN (4058)
ADMINISTRATIVE LAW JUDGE
611 Commerce Street, Suite 2704
Nashville, Tennessee 37203
615/255-0033

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been sent by facsimile transmission and by U. S. Mail, postage prepaid, to the following on this 23rd day of July, 1999:

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NOTICE

Any party aggrieved by this decision may appeal to the Chancery Court for Knox County, Tennessee or may seek review in the United States District Court for the district in which the school system is located. Such appeal or review must be sought within sixty (60) days of the date of the entry of a Final Order in non-reimbursement cases or three (3) years in cases involving education costs and expenses. In appropriate cases, the reviewing court may order that this Final Order be stayed pending further hearing in the cause.

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the Chancery or Circuit Court, under provisions of Section 49-10-601 of the Tennessee Code Annotated.

Within sixty (60) days from the date of this Order (or thirty [30] days if the Board of Education chooses not to appeal), the local education agency shall render in writing to the District Team Leader and the Office of Compliance, Division of Special Education, a statement of compliance with the provision of this Order.